Supreme Court, U.S.
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No. 01-1185

In The

Supreme Court of the United States

SPIRIT LAKE TRIBE,

Petitioner,

v.

STATE OF NORTH DAKOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO NORTH DAKOTA'S STATEMENT OF FACTS

One of the most serious flaws in the State's response to the Tribe's petition for a writ of certiorari is that the State's argument is based upon significant misstatements of the central facts of this case.

First, and most important, many of the State's arguments are premised upon its incorrect assertion that "In 1971 the State conveyed 62,000 acres of the lake to the United States." Brief for the State of North Dakota in Opposition (hereinafter "St. Br.") at 2. *See also*, St. Br. at 1 (In the questions which the State presents to this Court, the State asserts that "the United States has always treated the lake and its relicted lands as outside the reservation."[1])

This assertion is on the pivotal issue in this case, and it is directly contrary to the United States concession that, in 1867, Congress defined the Reservation to include all of Devils Lake. United States Reply Memorandum in Support of Motion for Summary Judgment at 4 (Dist. Ct. Docket No. 150); U.S. Response Brief to Court of Appeals at 14 n.7. The State's assertion is plainly incorrect under the posture of this case. For purposes of this appeal, it is undisputed that the 1971 quitclaim did not convey any land because *the State has never owned any portion of the lakebed.*

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[1] Rather than respond to the questions which the Tribe presents, the State of North Dakota drafted substantially different questions, and then it argues that the questions it drafted should not be reviewed by this Court.

The only thing the State gave the United States in 1971 was a quitclaim deed to land which the United States already owned. The first two questions which the Tribe presents in this case are whether an executive branch officer's acceptance of that quitclaim deed to land which Congress had already claimed in trust can trigger the QTA statute of limitations, and, if so, whether another federal officer can reassert the boundary which Congress established. The salient fact that Congress claimed the land in trust in 1867 cannot properly be disputed.

Second, most of the State's statement of facts relates to the wholly immaterial disputed allegation that there was "a century of non-Indian adverse use." The State made these same allegations to the Court of Appeals, and the Tribe's briefs to that Court discussed in detail 1) why the allegations of adverse use prior to 1971 were immaterial and 2) why the Tribe disputed the State's allegation of facts related to events prior to 1971.[2]

As the Tribe discussed in the Court of Appeals, the QTA statute of limitations begins to run when the *United States* asserts a claim to the land, and the United States did not make any claim to the land prior to the 1971 quitclaim deed. The State wants to re-frame the issue as "when did the Tribe know that non-federal entities were asserting a claim to the land?" Under the clear language of the QTA statute of limitations, that is not the issue.

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[2] The Tribe continues to strongly disagree with the State's recitation of pre-1971 facts, but will not discuss those immaterial disagreements in this reply brief.

The Court of Appeals rejected the State's attempt to rely upon alleged non-federal claims to the land. The Court held that the relevant inquiry was whether the Tribe knew or should have known of the 1971 quitclaim deed. *Spirit Lake Tribe v. State of North Dakota*, 262 F.3d 732, 738-39 (8th Cir. 2001). The State has not cross-petitioned on that portion of the Court of Appeals' holding, and this Court should not consider the State's attempt to prejudice the Court with its self-serving disputed version of the pre-1971 facts.

DISCUSSION OF LAW

I. This Court should determine whether the Tribe can bring a QTA action to enforce the Reservation boundary established by federal statute.

In 1867, Congress passed a statute which established the boundaries of the Spirit Lake Reservation. 15 Stat. 505. The statute states that the border of the Reservation is "along the waters" of Devils Lake and the Tribe brought a quiet title action, asking the Court to interpret the meaning of that federal statute. The federal court was asked to decide whether Congress meant that the Reservation border ran along the southern shore of the lake, along the northern shore, or on a straight line across the lake from the two points of call on the lake.

In Section I of its petition for a writ of certiorari, the Tribe discussed why this Court should determine whether the Court of Appeals for the Eighth Circuit was correct when it held that a federal executive branch officer's assertion, contrary to an Act of Congress, that the

United States owned land in fee, triggered the Quiet Title Act's statute of limitations. The State does not dispute that the present case presents that issue, and does not dispute that this Court has not resolved that important issue regarding federal executive branch authority to violate an act of Congress.

This Court has held that, under the Property Clause of the United States Constitution, Art. IV, Sect. 3, Cl. 2, "neither the courts, nor the executive agencies, could proceed contrary to an act of Congress in this congressional area of national power." *United States v. California*, 332 U.S. 19, 27 (1947). As discussed in detail in the Tribe's petition, the Court of Appeals below held that if an executive branch officer does "proceed contrary to an act of Congress in this congressional area of national power," the executive branch officer's action is a federal claim to land for purposes of the QTA statute of limitations. That decision is contrary to *Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000), and is in *at least* apparent conflict with this Court's decisions.

The State's short response to Section I of the Tribe's petition merely reiterates and expands upon the Tribe's discussion of the weak argument which could be advanced to attempt to support the Eighth Circuit Court of Appeals' decision.[3] It is the conflict between that argument and the holdings in *United States v. California*, 332

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[3] The State also attempts to place a straw man argument in place of the Tribe's actual argument. The State asserts that the Tribe chided the State and United States for failing to cite any case supporting the view that a federal official can change a Reservation boundary without congressional authorization. Obviously there is no case which holds that a low level federal

U.S. 19, *Royal Indem. Co. v. United States*, 313 U.S. 289, and *Warren v. United States*, which the Tribe asks this Court to resolve. The State's response brief merely accentuates the conflict and highlights the need to resolve that conflict.[4] This Court should resolve that conflict.

II. The Court of Appeals' decision that only Congress can abandon a federal officer's unlawful claim to land directly conflicts with other Circuit Court decisions which hold that a federal officer can abandon another federal officer's claim to land.

In Section II of its petition, the Tribe discussed the fact that the Eighth Circuit holding that a federal executive branch officer cannot abandon an unlawful QTA claim is contrary to the decisions of the other circuits which have reached that issue.

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executive branch officer can change a Reservation boundary established by federal treaty and statute. The Tribe chided the State and United States for making an argument, without any case citation in support, that an executive branch officer can claim land for the United States when that claim is directly in conflict with an act of Congress. It is that highly dubious and unsupported argument which the Court of Appeals adopted, and it is that issue which this Court should review.

[4] The only other point which the State makes in response to section I of the Tribe's petition is to incorrectly claim that perhaps the State acquired title to the lakebed under the "equal footing doctrine". St. Br. at 11. As the Tribe's petition correctly states, the equal footing doctrine could not apply in the present case because Congress claimed the land on behalf of the Tribe in 1867, and North Dakota became a state in 1889. Like many of its other arguments, the State's equal footing argument is contrary to the United States concession that the United States acquired the lakebed in trust for the Tribe in 1867.

The State attempts to minimize the conflict between the circuits. The State asserts that "there may be a difference between the Ninth Circuit and the [Eighth Circuit] Court of Appeals" over which federal officer can abandon another federal officer's claim to land.

There is a direct conflict on this important issue of federal law. The Eighth Circuit's decision was that *no* federal officer can abandon another federal officer's claim to land because claims to land can only be abandoned by Congress. *Spirit Lake Tribe* at 740. The Ninth Circuit has clearly held that, if a federal officer makes a claim to land for purposes of the QTA statute of limitations, another federal officer can abandon the federal claim to land. Contrary to the direct holding in *Spirit Lake Tribe*, the Ninth Circuit clearly does not require an act of Congress to abandon the claim.

All federal courts which have reached the issue have held that, when a federal officer makes a claim to land and the United States later abandons that claim, any reassertion of a claim would be a new claim for purposes of the QTA statute of limitations. These decisions are correct interpretations of 28 U.S.C. §2409a, which states that a claim accrues when a party knows or should know of a claim by the United States.

While the Eighth Circuit decision stated this general rule, it then devised a new, unprecedented exception to this rule. It held that only Congress could abandon a QTA claim. That decision is unquestionably contrary to *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995) and *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989). The

exception created by the Eighth Circuit completely swallows up the accepted general rule which the *Spirit Lake Tribe* Court claimed to adopt. This Court should review *Spirit Lake Tribe's* unprecedented holding that the only way the United States can abandon an executive branch officer's ultra vires claim is by an additional act of Congress.

III. This Court should resolve the divergence of authority in the Courts of Appeals regarding the standard of review applicable to an order granting summary judgment on a jurisdictional issue.

In Section III of the Tribes' petition, the Tribe demonstrated that, when the Court of Appeals reviewed an order of summary judgment entered against the Tribe, it resolved disputed issues of fact against the Tribe. The Court explicitly and unequivocally stated that, because the issue which the United States raised in its summary judgment motion was a jurisdictional issue, the Court was not bound by the standard summary judgment standard of review. *Spirit Lake Tribe* at 744.

The Tribe also showed that the Circuit Courts for the District of Columbia, Second, Fifth, and Sixth Circuits have reached a contrary conclusion.

In response to this straightforward argument, the State presents an unfocused discussion. First the State asserts that no holding from this Court prohibits a Court of Appeals from resolving facts against the party who did not move for summary judgment. The Tribe wholly agrees with the State's assertion that this Court has not ruled on the issue. As the Tribe argued in its petition, this

Court should grant the writ on the third question presented because this Court has not resolved that issue of law, and because there is a conflict in the circuits on this important issue.

The State also asserts that, because the Court of Appeals' stated in dicta that, if it had "credited all the Tribe's arguments and inferences about the 1976 and 1981 memos, we could not conclude (as a legal matter) that the QTA statute of limitations stopped."[5]

That dicta does not prevent this Court from resolving the important issue presented by the Court of Appeals'

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[5] The Tribe adamantly disagrees with the Court of Appeals' dicta. Even though, in litigation in 1981, the United States asserted the position stated in the Associate Solicitor's 1976 memo, *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1053 n.6 (8th Cir. 1990), and even though, in 1981, the United States issued a memo stating that the 1976 memo should *no longer* be relied upon as stating the position of the United States, the Court of Appeals thought that the United States had never relied upon the 1976 memo as stating the position of the United States.

Additionally, the Court of Appeals assumed, without evidence, that the Associate Solicitor lacked the authority to issue the memo, and the Court opined that the Associate Solicitor was not well-informed when he issued the memo. The Court also stated that the Tribe would not have relied upon the memo in 1976 because, the Court of Appeals assumed (without evidence) that, two years *later*, the Associate Solicitor would have told the Tribe that he lacked authority to issue the memo. *Spirit Lake Tribe* at 741.

If the correct summary judgment standard of review is applied, there clearly are disputed facts related to the 1976 memo.

holding, and then from either applying the standard summary judgment standard of review or remanding to the Court of Appeals for proper application of the summary judgment standard of review.

CONCLUSION

As it did in the Court of Appeals, the State of North Dakota has attempted to shift the focus away from the clearly presented, substantial question which the Tribe discusses in section I of its petition. In its response brief, the State buried its short response to that issue in the middle of its brief, and focused on the more factually and legally complex secondary issues presented in sections II and III of the Tribe's petition. The threshold issue in this case is whether Congress' claim is the federal claim for purposes of the Quiet Title Act, or whether an ultra vires act by an executive branch officer is the claim.

Over fifteen years ago, the Tribe filed this QTA to interpret and enforce the Reservation boundary which Congress adopted. The federal executive branch and the State of North Dakota have fought to prevent the courts from reaching the merits of that suit to enforce the Tribe's treaty. The State now suggests that, because the Court of Appeals' decision leaves open the possibility that the federal executive branch might some day bring a QTA suit to determine the meaning of the ambiguous federal statute, this Court should not review the issue presented in section I of the Tribe's petition. The Tribe disagrees. This Court should determine whether the Tribe must wait for the federal executive branch to bring suit, or whether

the Tribe can bring suit because the only valid and lawful federal claim to the land is Congress' claim, made in a solemn treaty with the Spirt Lake Tribe.

Respectfully submitted,

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